

Index

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 42139-s41C BY JOHN MICHAEL)	
MORNINGSTAR)	

* * * * *

The response of the Montana Power Company to the instant show cause order is in substance the same as those involved in numerous similar proceedings. See generally, In re Brown, et. al.. Our decisions therein control the present disposition.

WHEREFORE, the objection filed on behalf of the Montana Power Company is hereby ordered stricken.

Application for Beneficial Water Use Permit No. 42139-s41C is hereby granted to John Morningstar to appropriate 20 gallons per minute up to 6.25 acre-feet per year for irrigation of 2.5 acres more or less located in the NE1/4 of Section 23, Township 6 South, Range 3 West, in Madison County. In no event shall such waters be diverted prior to April 1 of any given year nor subsequent to October 1 of any given year. In addition, the Permittee is hereby authorized to use up to .05 acre-feet of the source of supply for stock-watering purposes continuously throughout the year if needed. The source of supply shall be certain waters tributary to North Fork Daylight Creek, at a point or points in the SW1/4 SE1/4 NE1/4 of Section 23, Township 6 South, Range 3 West, all in Madison County. The priority date for this Permit shall be February 9, 1982, at 2:00 p.m.

This Permit is subject to the following express conditions,

limitations, and restrictions.

A. Any rights evidenced herein are subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize the Permittee to divert water to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be withdrawn from the source of supply more water than is reasonably required for the purposes provided for herein.

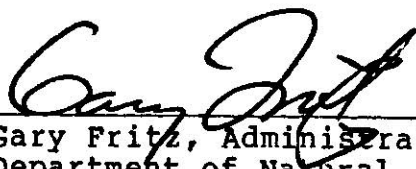
C. Nothing herein shall be construed to affect or otherwise reduce the Permittee's liability for damages which may be caused by the exercise of this permit.

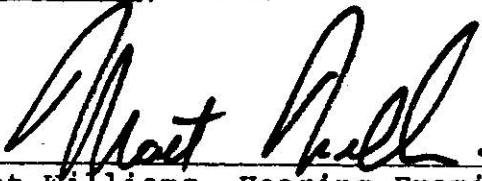
D. The Permittee shall proceed with reasonable diligence in completing the appropriation provided for herein by actually applying the water provided for herein to the named beneficial use.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 24 day of April, 1984.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605


Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6704

AFFIDAVIT OF SERVICE
FINAL ORDER

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 28, 1984, she deposited in the United States mail. Certified mail, an order by the Department on the Application by JOHN MICHAEL MORNINGSTAR, Application No. 42139-S41C, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. John M. Morningstar, Box 342, Virginia City, MT 59755
2. Montana Power Co., 40 East Broadway, Butte, MT 59701
3. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 (hand delivered)
4. Scott Compton, Bozeman Field Office (inter-departmental mail)
5. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 28th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohr
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	ORDER
NO. 42139-s41C BY JOHN MORNINGSTAR)	
)	

* * * * *

The objection filed with the Department of Natural Resources and Conservation to the above-named application by the Montana Power Company is identical in language to a number of objections previously filed by this entity with respect to similar applications. These objections all claim generally that there is a lack of unappropriated water available for the applicants' purposes, and that diversions made pursuant to these applicants' plans would result in adverse affect to the water rights claimed by the Montana Power Company. See MCA 85-2-311(1) and (2)(1981).

No claim is made either expressly or by implication in the present objection that the Applicant's proposed use is not a beneficial one, or that the Applicant's proposed means of diversion are not adequate for his purposes. See MCA 85-2-311(3) and (4). Nor has the Department in its own behalf indicated any concerns for the existence of these statutory criteria for a new water use permit. See generally, MCA 85-2-310(2)(1981).

Commencing with the Proposal for Decision In re Brown, and continuing through a number of applications where the Montana Power Company presented evidence at hearings held pursuant thereto, this Hearings Examiner has concluded that the scope and extent of this entity's rights to the use of the water resource as indicated by the evidence therein did not warrant denial of the respective applications for new water use permits. Since the instant objection alleges similar matters to those involved in prior hearings, hearings on the factual issues suggested by the present controversy threaten a waste of time and undue time and expense to the parties involved. See generally, MCA 2-4-611(3) (1981); MCA 85-2-309 (1982). The principles of stare decisis dictate that Montana Power Company be compelled to make a preliminary showing that its objection to the instant application has merit.

WHEREFORE, the Montana Power Company is hereby directed to show cause why its objection should not be stricken and the instant application approved according to the terms thereof. Said Objector shall file with the Department no later than May 16th 1983, ^(MWC) affidavits and/or other documentation demonstrating that the present Applicant is not similarly situated with respect to prior applicants for which permits have been proposed over this Objector's objections; and/or offers of proof as to matters not presented in prior hearings, which matters compel different results herein; and/or argument that the proposed dispositions in such prior matters were afflicted by error of law or were

otherwise improper; and/or any other matter that demonstrates that the present objection states a valid cause for denial or modification of the instant application.

DONE this 5th day of May, 1983.



Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

AFFIDAVIT OF SERVICE
ORDER

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on May 5, 1983, she deposited in the United States mail, first class mail, an order by the Department on the Application by John Morningstar, Application No. 42139-s41C, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. John Morningstar, Box 342, Virginia City, MT 59755
2. The Montana Power Company, 40 East Broadway, Butte, MT 59701
3. K. Paul Stahl, P.O. Box 1715, Helena, MT 59624
4. Matt Williams, Hearing Examiner, (hand deliver)
5. Scott Compton, Bozeman Field Office (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 5 day of MAY, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1/21/84